at the appellants' costs, discharge the said land from liability under the said two charges.

Appeal allowed.

Solicitors: *Chung & Huang; Shook Lin & Bok.*

CHONG CHONG WAH & ANOR. v. SIVASUBRAMANIAN

[F.C. (Suffian C.J., Gill and Ong Hock Sim F.JJ.)
November 20, 1973]
[Kuala Lumpur — Federal Court Civil Appeal No. 7 of 1973]

Control of Publications — Seizure of article suspected to contain prohibited or prejudicial publication — Impounding of prejudicial publication — Whether court has jurisdiction to entertain suit — Whether impounding unlawful — Control of Imported Publications Act, 1958 (Act 63), ss. 9(1) and 18(1).

This was an appeal against the judgment of the High Court ([1973] 1 M.L.J. 157), wherein it was held that the impounding of a book belonging to the respondent by the police was unlawful. The appellants appealed and it was argued *inter alia* (1) that the learned trial judge had no jurisdiction to entertain the suit because of the clear and unambiguous words of section 18 of the Control of Imported Publications Ordinance, 1958; (2) that the learned trial judge was wrong in holding that the impounding by the police was wrongful.

Held, dismissing the appeal: (1) as it was not shown that the book had been seized or impounded under the Ordinance within the meaning of section 18 of the Control of Imported Publications Ordinance, 1958, the court had jurisdiction to determine the validity or propriety of its seizure and impounding;

(2) on the evidence the learned trial judge was right in holding that the impounding of the book was wrongful.

The following authorities were cited in argument: *Mohamed Ashraff & Anor.* v. *Commissioner of Federal Capital* [1972] 2 M.L.J. 69; *Smith* v. *East Elloe Rural District Council* [1956] A.C. 736; *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147; *R.* v. *Statutory Visitors to St. Lawrence Hospital, Caterham* [1953] 2 All E.R. 766; *Commissioners of Custom & Excise* v. *Cure & Deeley Ltd.* [1962] 1 Q.B. 340; *Re Otago Clerical Workers' Award* [1937] N.Z.L.R. 578; *Hami Paihana* v. *Tokerau Dist. Maori Land Board & Ors.* [1955] N.Z.L.R. 314; *C.S. Rowjee & Ors.* v. *State of Andhra Pradesh & Ors.* A.I.R. 1964 S.C. 962; *Simms Motor Units Ltd.* v. *Minister of Labour etc.* [1946] 2 All E.R. 201.

FEDERAL COURT.

Abdul Razak bin Datuk Abu Samah (Senior Federal Counsel) for the appellant.

Lim Kean Chye for the respondent.

Suffian C.J.: The plaintiff was arrested and detained under the Internal Security Act. After his arrest the first defendant, Acting A.S.P. Chong Chong Wah, on 21st January, 1970, acting he said under the authority of the Act went to the plaintiff's house at Union Gardens, Kuantan, to search for documents. He found some books which he took away to check with Police headquarters. Subsequently he returned all of them except one entitled "Lenin" by David Shub.

There then followed some correspondence between the plaintiff and the Government — I shall return to this later on — and on 8th December, 1970, the plaintiff sued the first defendant and the second defendant his employers, the Malaysian Government, for —

(a) a declaration that the seizure of the book was wrongful;

(b) for the return of the book;

(c) for damages for detention of the book and for costs and further or other relief.

The learned judge declined to make the declaration sought; held that the book had been impounded by the first defendant; that such impounding was unlawful; and, as the book had been destroyed when the Special Branch building in Kuantan caught fire on 25th February, 1971, ordered the defendants to pay the plaintiff $3.60 (the cost of the book) and costs on the lower scale.

The learned judge did not award the plaintiff any damages as the claim for this was withdrawn by his counsel in his closing address.

The defendants appeal to this court.

There were originally five grounds of appeal, but three of them were abandoned, and thus there remain only two grounds.

It is argued, first, that the learned trial judge had no jurisdiction to entertain this suit because, it is said, of the clear and unambiguous words of section 18 of the Control of Imported Publications Ordinance, 1958; and, secondly, that he was wrong in holding that the impounding by the first defendant was wrongful.

Thus there are two issues in this appeal.

First, does the court have jurisdiction to entertain this suit in view of section 18 of the Ordinance? Second, was the impounding of the book in question wrongful?

It is necessary now to set out the words of sections 9 and 18 of that Ordinance. They read as follows:

"9. (1) Any authorised officer may seize, detain, open and examine any article which he suspects to contain any prohibited or prejudicial publication or any extract therefrom; and during such examination he may detain any person importing, distributing or posting such article, or in whose possession such article is found.

(2) If after such article has been opened and examined it is found —

(a) to contain or to consist of any prohibited publication or any extract therefrom, such article may be impounded and detained by an authorised officer for so long a period as he deems necessary and the person importing, distributing or posting it, or in whose possession it is found, may forthwith be arrested by such officer and proceeded against for the commission of an offence against section 8 or 10, as the case may be;

(b) in the opinion of an authorised officer to contain or to consist of any prejudicial publication or any extract therefrom, such article may with the approval of a Controller, be impounded by an authorised officer and withheld from delivery or return; and such officer may, with the approval of the Controller —

(i) destroy or cause to be destroyed such article or such contents thereof consisting of any such publication; and

(ii) deliver or cause to be delivered any such article or contents thereof which does or do not in the opinion of the Controller consist of such publication to the person to whom it would have been delivered if it had not been detained under this section, or in whose possession it was at the time of its seizure:

Provided always that instead of destroying or causing any such article to be destroyed the Controller may permit its return to the sender thereof.

(3) The provisions of this section shall not apply to any packing or article sent from any country outside Malaya and

coming into the Federation by land, air or water (whether or not landed or transhipped in the Federation) for the sole purpose of being carried to any country outside Malaya either by the same or another conveyance."

"18. No legal proceedings whatsoever shall lie or be instituted or maintained in any court for or on account of any loss of, or damage to, any article or publication seized, detained, confiscated or destroyed under this Ordinance or for or on account of any damage sustained as a result of the seizure, detention, confiscation, destruction or return of any article or publication under this Ordinance or of any delay in the delivery or return of such article or publication to the person to whom such article or publication would have been delivered but for its detention under this Ordinance."

The argument that the court had no jurisdiction to entertain this action was also made in the lower court but had been rejected by the learned trial judge, holding that the section did not preclude the court from determining the propriety or legality of any seizure, etc., made under the Ordinance. He said:

"... I am of the view that the restriction imposed by the section should be confined to its four walls. It bars only (1) proceedings for or on account of any loss of or damage to any article or publication seized, detained, confiscated or destroyed under the Act; or (2) proceedings for or on account of any damage sustained as a result of seizure, detention, destruction or return of any article or publication under the Act, or of any delay in the delivery or return of any article or publication... The provisions cannot be read as precluding the court from determining the *propriety or legality* of any seizure, detention, confiscation and destruction made under the Act. The section does not mention 'impounding'."

Section 18 refers to articles or publications seized, etc., *under this Ordinance*, which three words appear thrice in it, so legal proceedings barred by that section must relate only to articles or publications seized, etc., under the Ordinance and not under any other law. An article or publication to be seized, etc., under the Ordinance may be seized, etc., only in accordance with section 9 and not in accordance with any other section or any other statute.

On a proper construction of section 9, if the first defendant — undisputedly an authorised officer under the Act — had said in evidence which was accepted that —

(a) he suspected an article to contain a prejudicial publication;

(b) he seized it;

(c) he opened and examined the article;

(d) it is found in his opinion to contain prejudicial publication; and

(e) with the approval of the Controller he impounded and withheld it from delivery or return,

then of course the book would have been seized and impounded under the Ordinance; in which event the court will not enquire into the reasons why at the time he seized the article he suspected it to contain a prejudicial publication or why after he had opened and examined the article he was of the opinion that it contained a prejudicial publication or why the Controller approved that the publication be impounded and this suit if it was a proceeding for or on account of any loss of, or damage to, any article or publication seized, detained, or for or on account of any damage sustained as a result of the seizure or detention of the book, would have been barred by section 18.

To determine whether or not this suit was barred by section 18, it is necessary to determine whether or not the book in question had been seized and impounded under the Ordinance. The burden is on the defence to establish this, and the answer to the question can only be determined after a consideration of the evidence.

Let us review the evidence. First the evidence for the plaintiff. He said that on 18th April, 1971, *i.e.*, about three months after the seizure of the book while in the detention camp at Batu Gajah he received a letter (Exhibit P2) from the first defendant saying that the book in question was deemed prejudicial, thereby implying that that was the reason why unlike the other books that book was not returned to the plaintiff. On 7th May he received another letter (Exhibit P3) from the first defendant saying that the book had been declared prejudicial to security by the Ministry of Home Affairs on 22nd August, 1966, so it had not been returned.

On 30th October the plaintiff, being a lawyer, wrote to the Kuantan Special Branch office saying that he had checked the *Gazette* for 1966 but could not find the declaration by the Ministry and asking them to quote the *Gazette* notification. On 24th November the plaintiff wrote letter P5 asking the Ministry of Home Affairs whether the book had been proscribed under the Internal Security Act or under the Control of Imported Publications Ordinance, 1958. On 7th December, 1970, the first defendant's superior officer, Encik Waharuddin bin Haji Ahmad, wrote to the plaintiff a letter (Exhibit P10) saying that possession of the book had been prohibited by L.N. 329/52 as amended by L.N. 191/60, that any person who had it in his possession without lawful excuse would be guilty of an offence; declining to return the book and suggesting that the plaintiff appeal to the Minister of Home Affairs if he was not satisfied.

So on 8th December, 1970, the plaintiff brought this action, and only after that, on 21st December, *i.e.*, thirteen days later, did one Encik Hussein bin Mohd. Idrus writing on behalf of the Secretary-General of the Ministry of Home Affairs write to the plaintiff letter P6 saying "that the above book had been deemed prejudicial under the Control of Imported Publications Ordinance, 1958". That was the first time ever that the Ordinance was ever explicitly mentioned by anybody on behalf of Government to the plaintiff.

The defence attempted to explain this belated mention of the law under which the first defendant acted. The first defendant said in evidence that on 21st January, 1970, when the plaintiff was already under detention under the Internal Security Act, he (the first defendant) entered the plaintiff's house under the authority of the Act, that he seized the book and took it away, that after checking with headquarters he found that it was prejudicial because a circular (Exhibit D11) dated 26th August, 1966, from Police headquarters in Kuala Lumpur had stated that the book was prejudicial, though he himself had not read the book and did not personally know whether or not the book was prejudicial, that the reference in letter of 7th May to the book having been declared prejudicial by the Ministry of Home Affairs was a mistake and that he

had meant that it had been declared prejudicial by circular D11.

Encik Suleiman, A.S.P., said that the circular D11 dated 26th August, 1966, had been issued by him when he was with the Special Branch Headquarters in Kuala Lumpur, and that the book on Lenin referred to in it was the book in question.

Encik Waharuddin bin Haji Ahmad said that it was he who wrote and signed the letter P10 to the plaintiff saying that possession of the book had been prohibited by L.N. 329/52 as amended by L.N. 191/60 and that its possession without lawful excuse therefore constituted an offence under section 25 of the Internal Security Act, but that was a mistake, and that the book had in fact been seized under the Control of Imported Publications Ordinance, 1958.

In the event the learned judge found as a fact that while the first defendant probably suspected the book to contain something prejudicial in the circumstances of the times, though he did not address his mind to the particular provisions of the law or he was only vaguely aware of the existence of circular D11, but concluded that the defence had produced no evidence to show that any authorised officer had formed an opinion that the book was a prejudicial publication and no evidence that a Controller had approved the impounding of the book.

With respect I agree with the finding of the learned trial judge, and therefore in my opinion the book had not been seized nor impounded "under the Ordinance" within the meaning of section 18, and the court has jurisdiction to determine the validity or propriety of its seizure and impounding.

In view of my conclusion on the first issue, there is no need for me to say anything about Mr. Lim's submission that the word "article" in the phrase "any article which he suspects to contain any prohibited or prejudicial publication" in section 9 can only mean not "writing", but a container, something containing writing which is a prohibited or prejudicial publication, for, it is said, the intention of the Ordinance, as can be seen from its long and short titles and from its various provisions, is to control publications imported from abroad, and such publications may be imported in parcels and other containers.

That disposes of the first issue.

I now come to the second issue.

In concluding that the impounding by the first defendant was wrongful the learned judge gave reasons, six of which are attacked before us.

First, the judge said that the first defendant did not form his own independent opinion that the book was prejudicial, but relied on the circular D11 issued by Police headquarters, that that circular dictated to the first defendant what he should think about the book. Encik Abdul Razak argues that the learned judge was wrong, that the circular was only meant as administrative guidance to the first defendant and that it did not fetter the first defendant's discretion. I have studied the original of the circular and also its translation reproduced in the judgment and with respect I agree that it did dictate to the first defendant what he should think about the book; and also there is no denying the fact that in evidence the first defendant said that he never read the book, and that personally he did not know whether the book was a prejudicial publication or not, whereas section 9 makes it plain that it is for him personally to suspect and subsequently personally to think that the book was a prejudicial publication.

Secondly, the learned judge said that the Government had no authority to declare in a confidential circular that this particular book is a prejudicial publication. I agree with Encik Abdul Razak that the Government may issue administrative instructions for internal use, but here again there is no getting away from the fact that the law requires that the first defendant should himself form the necessary suspicion and the necessary opinion, and that he failed to do so.

Thirdly, the learned judge held that the circular D11 was issued on behalf of the Director of Special Branch and of the Inspector-General of Police probably at the direction of the Inspector-General of Police, but the latter had no authority under the Ordinance as he had not been appointed a Controller under section 3. Encik Abdul Razak argues that he had authority, under section 20 of the Police Act No. 41 of 1967, especially its subsection (2). I agree that under that provision of the Police Act the first defendant, in the exercise of his discretion under section 9 of the Control of Imported Publications Ordinance, is subject to the orders and directions of the Inspector-General of Police, but here again there is no denying the fact that he admitted in evidence that he personally formed no opinion whatsoever as to whether the book was a prejudicial publication or not.

Fourthly, the learned judge held that in any event the circular was meant to cover seizure etc. of prejudicial publications from bookshops, not from private homes. Encik Abdul Razak argues that in that case it cannot be said that when the first defendant seized and later impounded the book he had not exercised his own discretion. I agree that the circular was meant for bookshops, but here again there is no denying the fact that the first defendant admitted in evidence that he did not know whether or not the book was a prejudicial publication.

Fifthly, the learned judge held that the first defendant had not formed his own opinion as to whether or not the book was a prejudicial publication, because he had not himself read the book but relied on the opinion of others. Encik Abdul Razak argues that the first defendant need not read the book if his superiors had said, as they had done in circular D11, that the book was a prejudicial publication, and that circular had been issued on behalf of the Director, Special Branch, who is a Controller appointed under section 3 of the Ordinance, vide P.U. 356 of 1968. I agree that the first defendant need not read the whole book and that he can rely on advice or direction from others; but he must read at least a few words of it, to enable him to form an opinion for himself.

Sixthly, the learned judge held that the book had been impounded without the Controller's approval, and therefore the impounding was wrongful. Encik

Abdul Razak submits that the Ordinance does not say how the Controller's approval may be given, that it may be given orally or in writing, it may be given by conduct, at the time of the impounding or afterwards, that here the Controller had by circular D11 given approval to the impounding, that the letter P6 was post facto approval by a Controller of the impounding of the book. With respect I agree that the Controller's approval need not be given in any particular way, that it may be given in writing or orally, or by conduct, but I do not agree that it may be given before the impounding. On a proper construction of section 9 it must be given after the first defendant had himself formed the necessary suspicion and opinion. I agree that it may be given some time after the first defendant had formed the necessary suspicion and opinion; but here there is no getting away from the fact that there is no evidence that the author of letter P6 who signed on behalf of the Secretary-General, Ministry of Home Affairs, is a Controller appointed under section 3 of the Ordinance.

On the second issue, I would respectfuliy agree with the learned trial judge that the impounding of the book was wrongful.

I would therefore dismiss this appeal.

As to costs, the learned judge awarded the plaintiff costs on the lower scale. In my opinion that order should stand. The plaintiff will also get his costs here.

Gill and **Ong Hock Sim F.JJ.** concurred.

Appeal dismissed.

Solicitors: *S Sivasubramanian.*

WAN NAIMAH v. WAN MOHAMAD NAWAWAI

[F.C. (Azmi L.P., Suffian C.J. and Ali F.JJ.)
November 23, 1973]
[Kuala Trengganu — Federal Court Civil Appeal No. 121 of 1972]

Land Laws — Trust — Declaration of trust — May be made informally, provided words are clear and unequivocal.

In this case the land had been sold to the parties' father but the land was transferred to the brother-in-law of the purchaser. Subsequently the whole land was transferred to the appellant, the daughter. The respondent, the son of the purchaser, was then still an infant. There was evidence to show that the father intended to create a trust of an undivided half share in the land in favour of his son, the respondent. The learned trial judge held that the appellant held the half-share in the land in trust for the respondent. The appellant appealed.

Held, dismissing the appeal: on the facts the learned trial judge was right in holding that the half-share in the land was held by the appellant, the registered proprietress, in trust for the respondent.

Case referred to:-

(1) *Grant* v. *Grant* 55 E.R. 776.

The following authorities were also cited in arguments: *Shephard* v. *Cartwright* [1955] A.C. 431, H.L.; [1954] 3 All E.R. 649; *Yew Phaik Hoon* v. *Quah Ooi Keat and Anor.* [1969] 1 M.L.J. 32, 34 2nd column F. 35 1st column, line I; *Standing* v. *Bowring* (1885) 31 Ch. D. 282; *Booth* v. *Turle* (1873) L.R. 16 Eq. 182, 188; *M'sadden* v. *Jenkyns* 41 E.R. 589; *Parker* v. *Stones* (1868) L.J. Ch. 46 or 19 L.T. 259; *Thorpe* v. *Owen* 49 E.R. 563; *Grey* v. *I.R.E.* [1958] 2 All E.R. 428, 430, 433 B3; *A.G.* v. *Downing* 97 E.R. 1, 9; *Gray* v. *Gray* 61 E.R. 345, 349; *Morgan* v. *Malleson* (1870) L.R. 10 Eq. 475, 476; *Warren* v. *Gurney* [1944] 2 All E.R. 472, 474; *Richards* v. *Delbridge* (1874) L.R. 18 Eq. 11.

FEDERAL COURT.

Datuk H. L. Wrigglesworth for the appellant.

Raja Abdul Aziz bin Raja Addruse for the respondent.

Suffian C.J. (delivering judgment of the Court): The main question in this appeal is whether the plaintiff (respondent before us) has proved that an undivided half share in Lot No. 396 in Pasir Mas and bearing Grant No. 5050 is held by the registered proprietress, his sister the defendant (appellant before us), in trust for him, as was found by the learned trial judge.

The undisputed facts are as follows. The land in question originally belonged to Wan Ibrahim bin Haji Wan Sulaiman. Some time before 7th April, 1956, he sold it to Haji Wan Abdullah, the parties' father now deceased. On that day Wan Ibrahim transferred it not to the purchaser but to the purchaser's brother-in-law, one Ahmad bin Haji Awang. At that time the purchaser's daughter (the defendant) was already married, but his son (the plaintiff) was still an infant. On 9th June, 1957, Ahmad bin Haji Awang transferred the whole land to the defendant.

In 1960 the deceased built on the land a shophouse which was completed early in 1961. The deceased occupied the shophouse for about four months, and then he leased it to the United Malayan Banking Corporation. Some time in 1968 the deceased died. The land had never at any time been registered in his name and at the time of his death it was registered in his daughter's name.

The plaintiff claims that his sister held an undivided half share in the land including the portion occupied by the shophouse in trust for him.

With respect we agree with the learned trial judge that the plaintiff has produced evidence sufficient to prove that the defendant held that half undivided share in trust for him, and that therefore this appeal be dismissed.

The law is that a declaration of trust may be made quite informally, provided that the words used are clear and unequivocal. As was stated by Romilly M.R. in *Grant* v. *Grant*,[1] words declaring a trust

"need not be in writing.... They must be clear, unequivocal and irrevocable, but it is not necessary to use any technical words, it is not necessary to say, 'I hold the property in trust for you,' nor is it necessary to say, 'I hold the same for your separate use.' Any words that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust. I think that it is also sufficient for the purpose of shewing that the trust has been created, if he afterwards states that he has so created the trust, though there was no witness except the donee present at the time the trust was created." (Page 777.)

The Master of the Rolls was speaking of a declaration of trust in respect of chattels, which may be created by parole, but as a trust in respect of land may be created in Kelantan also by parole (the English Statute